Supreme Court, U.S.
FILED
MAY 24 1999
CLERK

No. 98-1478

In The

# Supreme Court of the United States

ZENOBIA HAMILTON RAINEY,

*Petitioner,*

v.

ROBERT LEE CHEVER,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia**

## AMICUS CURIAE BRIEF FOR THE STATE OF GEORGIA IN SUPPORT OF PETITIONER

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## *AMICUS CURIAE* BRIEF FOR THE STATE OF GEORGIA IN SUPPORT OF PETITIONER

### I. SUMMARY OF ARGUMENT

This is an appeal from an order of the Supreme Court of Georgia, ruling that O.C.G.A. § 53-2-4(b)(2) is unconstitutional under both federal and state equal protection guarantees. The State Department of Law (hereinafter "Law Department") initially declined the opportunity to file an *amicus curiae* brief. However, by letter dated April 23, 1999, this Court directed the Law Department to file an *amicus curiae* brief on behalf of the State of Georgia (hereinafter "state").

Section 53-2-4(b)(2) (formerly O.C.G.A. § 53-4-5(b)(2)) of the Georgia Code provides that neither a father nor other paternal kin of a child born out of wedlock may inherit from the child if it is established by a preponderance of the evidence that the father failed or refused openly to treat the child as his own or failed or refused to support the child. As demonstrated below, this statute is not violative of the equal protection guarantees established under the United States Constitution and the Georgia Constitution. It is well established that mothers and fathers of out-of-wedlock children are not similarly situated. *See Parham v. Hughes*, 441 U.S. 347 (1979). Furthermore, this statute makes a distinction, similar to that made by other statutes upheld by this Court, based on the actions of the parent rather than on the immutable characteristic of gender. *See id.*; *Miller v. Albright*, 118 S. Ct. 1428 (1998) (plurality opinion); *Lehr v. Robertson*, 463 U.S. 248 (1983). Because the classification is based on

action rather than status, this statute needs only to be rationally related to a permissible state purpose in order to withstand an equal protection challenge. *See Parham*, 441 U.S. at 347. The statute will, however, withstand even a heightened scrutiny because the legislative classification at issue is also substantially related to the state's legitimate objectives of discouraging illegitimacy and paternal irresponsibility and encouraging marriage and child rearing in a family relationship. For all of these reasons and the reasons enumerated below, the state urges this Court to uphold the constitutionality of O.C.G.A. § 53-2-4(b)(2).

## II. STATEMENT OF THE CASE

Petitioner, the mother of the decedent, DeAndre Hamilton, filed a Petition to Determine Interests of Heirs, pursuant to O.C.G.A. § 53-2-4(b)(2), in the Superior Court of Gwinnett County on November 3, 1997. Petitioner sought a determination that Respondent, the putative biological father of the decedent, was not entitled to inherit from the decedent based upon Respondent's failure or refusal to openly treat the child as his own. Respondent filed an Answer on November 25, 1997.

Petitioner filed a Motion for Summary Judgment and Brief in Support on February 13, 1998. Respondent filed a Brief in Response to Petitioner's Motion for Summary Judgment and in Support of Respondent's Motion for Summary Judgment on March 16, 1998. In his Brief, Respondent raised a constitutional challenge to O.C.G.A. § 53-2-4(b)(2), asserting that the statute violated his rights



to due process and equal protection under the United States and Georgia Constitutions.

The superior court entered an order on May 8, 1998, ruling that O.C.G.A. § 53-2-4(b)(2) was unconstitutional under the federal and state equal protection guarantees. Petitioner appealed that decision to the Supreme Court of Georgia, which affirmed on January 19, 1999. Petitioner then filed a Notice of Intent to File a Petition for Certiorari on March 3, 1999 and a Petition for Certiorari on March 15, 1999. By letter dated April 23, 1999 from the Clerk of this Court, the Law Department was directed to file an *amicus curiae* brief on behalf of the state.

## III. STANDARD OF REVIEW

The statute at issue is subject to a rational basis review. "Legislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others." *Parham*, 441 U.S. at 351 (*citing, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979)). These laws are generally entitled to a presumption of validity against attack under the Equal Protection Clause and will be upheld unless it is shown that the classifications "bear no rational relationship to a permissible state objective." *Id.* (*citing, e.g., Lockport v. Citizens for Community Action*, 430 U.S. 259, 272 (1977)). This presumption is undermined when the legislature creates classes based upon certain immutable characteristics, such as gender, and thus unreasonably discriminates among people who are similarly situated. *Id.* To withstand judicial scrutiny under the Equal Protection Clause, such gender-based classifications "must serve important

governmental objectives and must be substantially related to achievement of those objectives." *Orr v. Orr*, 440 U.S. 268, 279 (1979). *See Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 468 (1981); *Craig v. Boren*, 429 U.S. 190, 197 (1976). The statute at hand does not invidiously discriminate based on gender, and thus should be analyzed under the lower level of scrutiny. In the alternative, if this Court finds that the classifications in O.C.G.A. § 53-2-4(b)(2) are based upon immutable characteristics, this Court should then apply an intermediate level of scrutiny.

## IV. ARGUMENT AND CITATION OF AUTHORITY

The United States Constitution and the Georgia Constitution prohibit the State from denying to any person the equal protection of the laws. *See* U.S. Const. amend. XIV, § 1; Ga. Const. art. 1, § 1, ¶ 2; *City of Atlanta v. Watson*, 267 Ga. 185, 187 (1996).

In order to overcome the presumption that legislation is constitutional as passed and to establish an equal protection violation, Respondent must establish that the legislation discriminates between similarly situated persons and is not reasonably related to a permissible state interest. *See Parham*, 441 U.S. at 347. In the alternative, if Respondent can show that the legislation classifies individuals based upon immutable characteristics such as gender, rather than based upon action or inaction, he must then show that the classes are similarly situated and that the statute does not "serve important governmental



objectives and . . . [is not] substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

### A. SECTION 53-2-4(b)(2) OF THE GEORGIA CODE IS NOT INVIDIOUSLY DISCRIMINATORY BECAUSE IT DOES NOT CLASSIFY BASED UPON IMMUTABLE CHARACTERISTICS, BUT RATHER CLASSIFIES BASED UPON THE ACTIONS OF SOME FATHERS OF ILLEGITIMATE CHILDREN.

In equal protection challenges, this Court has often distinguished between legislation that classifies based on action and legislation that classifies based on status. In upholding a Georgia statute that requires a father to legitimate a child before he may sue for wrongful death, this Court recognized that the classification drawn by that statute does not "discriminate against fathers as a class but instead distinguishes between fathers who have legitimated their children and those who have not." *Parham*, 441 U.S. at 356. This classification is not premised on "overbroad generalizations and [does not exclude] all members of one sex even though they were similarly situated with members of the other sex." *Id.* This Court noted that a father has the ability to change his class simply by legitimating the child. *Id.* at 356-357, n. 9. *See also Miller*, 118 S. Ct. at 1428 (upholding a federal statute requiring children born abroad and out of wedlock to citizen fathers and alien mothers to obtain formal proof of paternity by age eighteen in order to acquire United States citizenship by birth). To survive an equal protection challenge, such a statute needs only to be "rationally

related to a permissible state objective." *Parham*, 441 U.S. at 357.

The same reasoning, when applied to the statute at hand, mandates that it be upheld as constitutional so long as it is rationally related to a permissible state objective. Section 53-2-4 is not premised on overbroad generalizations which exclude all fathers, but merely singles out those fathers who have taken no action during the life of their children to "openly treat" them as their own or "provide support" for them. O.C.G.A. § 53-2-4(b)(2). As in *Miller* and *Parham*, the father is not discriminated against by virtue of his gender, which is immutable, but is singled out based on his actions. Specifically, the father who is affected by this statute is so affected by virtue of his refusal to take responsibility for his illegitimate child. The father may change his classification at any time simply by attempting to contact his child or to recognize the child as his own.

Furthermore, this Court has recognized the legitimacy of putting extra burdens on a father of an illegitimate child if necessary to serve a legitimate state purpose. *See Miller*, 118 S. Ct. at 1428; *Lehr*, 463 U.S. at 248; *Parham*, 441 U.S. at 347; *Quilloin v. Walcott*, 434 U.S. 246 (1977). "The conclusion that Congress may require an affirmative act by unmarried fathers and their children, but not mothers and their children, is directly supported by *Lehr v. Robertson*, 463 U.S. 248." *Miller*, 118 S. Ct. at 1431 (plurality opinion). This Court in *Lehr* specifically recognized that the State of New York did not violate equal protection by requiring a father to establish a custodial, personal, or financial relationship with the child before he is entitled



to notice of the child's adoption proceedings. 463 U.S. at 248. Similarly, in *Quilloin* this Court upheld the constitutionality of Georgia statutes requiring the consent of the mother for the adoption of a child born out of wedlock and giving the mother exclusive parental prerogatives, including the power to veto the adoption of the child, until the child is legitimated. 434 U.S. at 246. That extra burdens may be placed on a father is especially true where, as in *Miller*, the father has ample time to fulfill such burdens. *See Miller*, 118 S. Ct. at 1428. (noting that the father had eighteen years to legitimate his child). Thus, the extra burden placed by O.C.G.A. § 53-2-4(b)(2) on fathers of illegitimate children does not render the statute unconstitutional as a violation of equal protection.

### B. SECTION 53-2-4(b)(2) OF THE GEORGIA CODE DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST FATHERS OF CHILDREN BORN OUT OF WEDLOCK BECAUSE MOTHERS AND FATHERS OF CHILDREN BORN OUT OF WEDLOCK ARE NOT SIMILARLY SITUATED.

This Court has held that the mothers of children born out of wedlock and the fathers of those children are not similarly situated for purposes of the Equal Protection Clause of the Fourteenth Amendment. *See Parham*, 441 U.S. at 355. The *Parham* case involved a challenge to a Georgia statute that prohibited fathers of children born out of wedlock, who had not legitimated their children, from maintaining a wrongful death action. This Court held that the statute at issue in *Parham* did not violate the Equal Protection Clause of the Fourteenth Amendment

because the statute did not invidiously discriminate against the appellant-father because of his sex. *See id.* at 355. Rather, this Court declared that mothers and fathers of children born out of wedlock are not similarly situated: under Georgia law, only a father can by voluntary unilateral action legitimate a child born out of wedlock. *See id.* This Court added that unlike the mother of a child born out of wedlock, the identity of the father will frequently be unknown. *Id.*

This Court also found that men and women are not similarly situated when it addressed a challenge to California's statutory rape law, which made men alone criminally liable for the act of sexual intercourse. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). Recognizing that the states have a "strong interest in preventing [illegitimate] pregnancy," the Court in *Michael M.* held that the gender-based classification did not violate the Equal Protection Clause. 450 U.S. at 472-73 (bracketed material supplied). The Court specifically noted that "[w]e need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity." *Id.* at 471.

In the case *sub judice*, Petitioner presented the affidavits of two witnesses who corroborated this Court's opinion that mothers and fathers of children born out of wedlock are not similarly situated. Patrick Fagan, former Deputy Assistant Secretary for Family and Social Services Policy of the United States Department of Health and



Human Services, is an expert in urban policy and the breakdown of the family in America. Mr. Fagan evaluated O.C.G.A. § 53-2-4(b)(2) and determined that the statute accurately reflects the differences between mothers and fathers of illegitimate children. He provided the following analysis:

> Research over several decades has indicated that a biological father of a child born out of wedlock is unlikely to maintain any consistent relationship with the mother and child out of wedlock. Follow-up studies of mothers who kept their babies shows that less than 10% of fathers of children born out of wedlock had consistently kept in touch with the mothers and children for even a few months after the birth out of wedlock, and that the fathers tended to provide financial support only as required by court order.
>
> . . . .
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> While Code Section 53-4-5(b)(2) [now codified as O.C.G.A. § 53-2-4(b)(2)] does treat men differently from women, that distinction appears to reflect the real biological differences between men and women with regard to childbirth and child rearing. Females are the only people who get pregnant and give birth. They, far more than fathers, are for that reason likely to experience significant parent-child bonding and to take responsibility for child-care from the beginning. Mothers of children born out-of-wedlock, if they do not give up the children for adoption, are likely to raise the children themselves and/or with the assistance of their mothers or other family members. . . . If mothers of children born

out-of-wedlock completely abdicate responsibility for caring for the children or arranging for their care within the extended family, they are much more likely than fathers to be subjected to legal proceedings to place the children in foster care and to terminate their parental rights. On the other hand, fathers of children born out-of-wedlock, may much more easily just absent themselves and never have any personal involvement with a child, particularly if their sexual and personal association with the mother has ended, and there are no social bonds of marriage and legitimacy to give the father a moral sense of paternal responsibility. Because of these biological and social factors arising from pregnancy and childbirth, but often continuing through the life of a child born out of wedlock, mothers and fathers of children born out-of-wedlock are not similarly situated.

(Petitioner's Appendix D) (bracketed material supplied).

Representative William C. Randall, Chairman of the Special Judiciary Committee of the Georgia House of Representatives, who sponsored O.C.G.A. § 53-4-5(b)(2) (now codified as O.C.G.A. § 53-2-4(b)(2)), also elucidated the rationale behind the classification at issue:

> This legislation was drafted in terms applying to fathers of children born out of wedlock because we found no instances of mothers of children born out-of-wedlock having little or nothing to do with their children. In our legislative hearings, the only examples of parents of children born out of wedlock [sic] failed to openly treat their children as their own did involve fathers. Based upon the information presented in our hearings, and observation of behavior patterns



> in our own communities, we found a widespread problem of fathers of children born out of wedlock failing or refusing to accept responsibility with regard to childbearing, failing or refusing to develop of [sic] substantial family relationships with their children, and failing or refusing to provide support except as compelled by the courts under threat of going to jail.
>
> . . . .
>
> It [the classification at issue] is based upon real differences in the conduct of men and women in the real world, apparently arising out of the real biological differences in their roles relating to conception, pregnancy and childbirth.

(Petitioner's Appendix E) (bracketed material supplied).

Therefore, it is clear that mothers and fathers of children born out of wedlock are not similarly situated and that the statutory classification made in O.C.G.A. § 53-2-4(b)(2) is realistically based upon the differences in their situations. *See Parham*, 441 U.S. at 354.

### C. THE CLASSIFICATION CREATED BY SECTION 53-2-4(b)(2) OF THE GEORGIA CODE SUBSTANTIALLY SERVES THE STATE'S LEGITIMATE OBJECTIVES OF DISCOURAGING OUT-OF-WEDLOCK BIRTHS AND PATERNAL IRRESPONSIBILITY AND ENCOURAGING MARRIAGE AND CHILD-REARING IN A FAMILY RELATIONSHIP.

This Court has recognized the states' legitimate interest in discouraging out-of-wedlock births and in encouraging fathers of illegitimate children to take

responsibility for those children and to participate financially, emotionally and physically in their upbringing. *See, e.g., Parham,* 441 U.S. at 347; *Lehr,* 463 U.S. at 248. This Court has also recognized a legitimate state interest in encouraging the development of a healthy relationship between parent and child. *See Miller,* 118 S. Ct. at 1428. A valid way for a state to do so is to place limits on the rights of the parents upon the death of the illegitimate child. "It is thus neither illogical nor unjust for society to express its 'condemnation of irresponsible liaisons beyond the bounds of marriage' by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child." *Parham,* 441 U.S. at 353.

The existence or nonexistence of a substantial relationship between parent and child has been found to be a relevant criteria in evaluating the rights of the parent. *Lehr,* 463 U.S. at 266-7. By disallowing a biological father from inheriting from his out-of-wedlock child if the father failed or refused to treat the child as his own or failed or refused to support the child, O.C.G.A. § 53-2-4(b)(2) substantially serves the state's important interest in discouraging illegitimacy and paternal irresponsibility. As Representative Randall stated:

> This legislation was drafted, proposed and passed because of situations that had come to the attention of members of the General Assembly in which a father of a child, born out of wedlock had failed to form a substantial parental relationship with a child, failed to provide support for the child, or both, and then came forward seeking to profit from the death of the child. The most prominent example that immediately comes to my mind involved a child who had become a professional athlete and made a lot of money, and upon the adult child's death the father who had nothing to do with the child as he was growing up came forward to make a claim as an heir of the adult child's estate. We were also aware that there could be other applications of this, such as an uninvolved biological father making a claim to a child's estate in the event of the wrongful death of a child.
>
> . . . .
>
> This statue [sic] should remove the potential for men reaping a windfall profit from death of child born out of wedlock for whom the man accept [sic] no substantial responsibility, which is both a subject of righteous moral condemnation and a conduct which the state has a substantial interest in deterring. In my opinion, this legislation thus serves a legitimate government interest.

(Petitioner's Appendix E).

Furthermore, Mr. Fagan declared in his affidavit that there has been a steady upward trend in out-of-wedlock births in the United States. Mr. Fagan explained:

> Studies of children born out-of-wedlock reveal that among the principal effects of birth out-of-wedlock and growing up without the presence and active involvement of a father are: lower newborn health and increased risk of early infant death; retarded cognitive and verbal development; lowered educational achievement; lowered levels of job attainment; increased behavioral problems; lowered ability to control

> impulses; warped social development; increased dependence on welfare; increased exposure to crime; and increased risk of being physically or sexually abused.

(Petitioner's Appendix D). These consequences of out-of-wedlock births "support a strong state interest in discouraging out of wedlock births and paternal irresponsibility." *Id.*

This Court has emphasized that "[t]he relevant inquiry is not whether the statute is drawn as precisely as it might have been, but whether the line chosen by the . . . [l]egislature is within constitutional limitations." *Michael M.*, 450 U.S. at 473 (*citing Kahn v. Shevin*, 416 U.S. 351, 356, n. 10 (1974)). The classification made in O.C.G.A. § 53-2-4(b)(2) certainly falls within constitutional limitations: the distinction drawn in the statute does not discriminate against men based upon their gender, and the classification substantially serves legitimate government objectives. Thus, the statute does not violate equal protection under either intermediate scrutiny or a rational basis review.

## V. CONCLUSION

Legislation is presumed to be constitutional, and must be upheld in the face of an equal protection challenge unless it is shown that the statute invidiously discriminates against similarly situated persons. Section 53-2-4 should be analyzed under the lowest level of scrutiny because it does not classify based upon immutable characteristics, such as gender. Instead, it classifies based upon actions of certain fathers of illegitimate children.



Moreover, even if this Court determines that the statue must be considered under an intermediate level of scrutiny, the statute should be upheld. This Court has consistently found that mothers and fathers of illegitimate children are not similarly situated. Furthermore, this legislation, by essentially requiring a father of an illegitimate child to establish a relationship with that child before he can inherit from that child, is substantially related to the important government objectives of encouraging responsible parenting and discouraging illegitimacy. The State of Georgia respectfully requests this Court to uphold the constitutionality of O.C.G.A. § 53-2-4(b)(2).

Respectfully submitted,

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